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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-5103

MAR 24 1972

MICHAEL RODAK, JR., CLERK

JOHN J. MORRISSEY and G. DONALD BOOHER,  
*Petitioners,*

v.

LOU V. BREWER, WARDEN,  
*Respondent.*

**BRIEF OF THE AMERICAN BAR ASSOCIATION,  
AMICUS CURIAE**

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**BRIEF OF THE AMERICAN BAR ASSOCIATION,  
AMICUS CURIAE**

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**INTEREST OF AMICUS\***

The American Bar Association is a national membership organization of the legal profession. It counts as members more than 155,000 lawyers from all states and has for some years maintained an active interest in criminal justice improvement. One of its recent and more ambitious undertakings in this area has been the American Bar Association's

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\*Letters of consent from counsel for petitioners and counsel for respondent have been filed with the clerk of the Court.

Project on Minimum Standards for Criminal Justice, elements of which (as referred to in our argument) are pertinent to issues before the Court in this case.

In 1970, the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services to reflect its growing interest in and commitment to the correctional phase of criminal justice administration. The Commission has undertaken a program to stimulate broadscale improvement in all aspects, legal and operational, of the nation's systems for correction and rehabilitation of criminal offenders.

As the Association's major instrumentality for correctional reform, the Commission has a special interest in the issues of correctional administration and due process being litigated in this case. Among the Commission's several action projects are a National Parole Aide Volunteer Program which has brought it into direct contact with parole administrations in several states and a soon to be established Resource Center for Correctional Law and Legal Services concerned with resolution of the growing number of legal and constitutional questions now being raised in connection with the operation of correctional programs and systems. Focusing on the demands of both law and sound correctional practice, the Commission is anxious to contribute to full consideration of legal questions which bear so significantly on the effectiveness and fairness of our correctional apparatus.

With due recognition of the extended legal analysis offered in the briefs of the parties and other amici, the Association has briefly set forth its views herein on the important question involved in this case.

## THE QUESTION PRESENTED

Whether revocation of parole without a hearing violates the Fourteenth Amendment of the United States Constitution by depriving a person of liberty without due process of law.

## SUMMARY OF ARGUMENT

In the view of amicus, the judgment of the court below in this case is erroneous. It seems to rely on the largely abandoned "hands-off" doctrine as its rationale for not inquiring whether petitioners have been denied due process of law as guaranteed by the Fourteenth Amendment.

As cases have come before it in recent years, this Court has upheld the existence of due process rights in other correctional contexts where substantial deprivations of liberty or other constitutionally protected interests have been imposed by administrative action. In this case, the Court is asked to affirm the right of parolees to a hearing before their parole may be revoked for alleged violation of parole conditions. In so doing, the Court's action would be supportive of decisions in other Courts of Appeals *contra* to that of the Eighth Circuit in this case, both directly and by implication.

Although several rationales have been suggested by the court below to support the notion that this case involves a privilege rather than a right, this Court in *Goldberg v. Kelly* indicated it is the substantive interests at stake which must be examined, and not the characterization of them. Petitioners have a substantial interest in not being deprived of their liberty summarily based solely on assertions regarding their conduct, the accuracy of which they challenge.

The best thinking of correctional authorities, as set forth in the professional standards of the American Correctional Association and the National Council on Crime and Delinquency, is that parole should not be revoked without offering a hearing to the parolee. This is also the judgment of the American Bar Association and the actual practice in most correctional systems. It is incorporated in such model legislation as the Model Penal Code and was the recommendation, too, of the President's Commission on Law Enforcement and Administration of Justice.

The Court should promote the rule of law in corrections by recognizing that these petitioners cannot be returned from parole status in the community to prison confinement without a hearing.

### ARGUMENT

#### I. THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT ENTITLES PAROLEES FACED WITH A LOSS OF THEIR LIBERTY BY REVOCATION OF PAROLE TO A HEARING.

The court below ruled that a parolee can be returned to prison based on the *ex parte* allegations of his parole officer that he violated some condition of his parole. The court's opinion seems to be premised on the assumption that courts, particularly federal courts, should not interfere with the operations of state penal systems. The administration of prisons, probation and parole is deemed a matter of state concern, and any changes in procedures are considered a matter of legislative rather than judicial competence. *Morrissey v. Brewer*, 443 F.2d 942, 951-952 (8th Cir. 1971). Thus the four-judge majority appears to have based its decision on the traditional notion of judicial abstention in prison cases, otherwise known as the "hands-off" doctrine.

If the judicial history of the past ten years has made one thing clear, it is that federal courts will no longer rely on the doctrine of "hands-off" to deny convicted offenders access to the courts. The most recent example of repudiation of the "hands-off" approach occurred in *Haines v. Kerner*, 92 S.Ct. 594 (1972) (*per curiam*). The district court had dismissed without a hearing a petition alleging lack of due process and the infliction of physical injuries suffered by an inmate in the course of undergoing discipline within a state prison. The United States Court of Appeals for the Seventh Circuit affirmed, based on the premise that federal courts should not inquire into the internal operations of state penitentiaries. This Court reversed.

The instant case, which involves the reimprisonment of parolees who already had been granted conditional liberty, presents an even weaker case for invoking the internal discipline rationale than *Haines*. Reversal of the decision below would not be venturing into new territory; indeed, any other action would be inconsistent with the thrust of this Court's recent decisions involving the rights of convicted offenders. See, e.g., *Wilson v. Kelley*, 393 U.S. 266, (1969) (*per curiam*); *Houghton v. Shafer*, 392 U.S. 639 (1968) (*per curiam*); *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Arciniega v. Freeman*, 404 U.S. 4 (1971).

In its decisions in *Johnson v. Avery*, 393 U.S. 483 (1969), and *Younger v. Gilmore*, 404 U.S. 15 (1971) (*per curiam*), this Court has evidenced particular concern for ensuring prisoners' right of access to court. It is essential that judicial avenues be kept open as a last resort. Yet courts can perform only a small part of the role of overseeing correctional operations. Consequently, the trend of many recent federal court decisions has been to recognize a right to due process protections within the correctional

system. The principle that offenders do not lose their constitutional rights to due process of law by now has become too widely accepted to require argument.

Various theories have been used to justify the inapplicability of due process protections to the revocation of parole. All have been questioned by recent judicial decisions and are dealt with in full by the Brief of the American Civil Liberties Union, *Amicus Curiae*, in this case. Chief among the legalistic rationales is the argument that parole is a privilege rather than a right, and thus may be revoked summarily. This distinction, long out of favor, was finally laid to rest by the Court's statement in *Goldberg v. Kelly*, 397 U.S. 254, 262, (1970) that "the constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege' and not a 'right'". The *Goldberg* decision, which involved the termination of welfare benefits without a hearing, also rebuts the argument that the classification of a proceeding as administrative rather than criminal eliminates the need for procedural protections. This rationale was used by the court below in seeking to create a distinction between revocation of parole and revocation of probation, which already has been ruled to require a hearing. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970). Indeed, courts of appeals in two other circuits have expressed views *contra* to the eighth circuit in *Morrissey* on the necessity of hearings in parole revocation proceedings. *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *Murray v. Page*, 429 F.2d 1359 (10th Cir. 1970).

The fact that the consequences of a revocation of parole can be as grave as a return to prison clearly brings the present case within the purview of the balancing test enunciated in *Goldberg*, namely, that "the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication." 397 U.S. at 263. In the

instant case, petitioners have served three additional years in prison based on the *ex parte* statements of their parole officers that they had violated the terms of their parole. The reports, which would have been considered hearsay in court, charged "numerous violations" of the conditions of parole, including in one case the purchase of an automobile under an assumed name, unauthorized operation of the vehicle, purchase of furniture by use of an assumed name in order to obtain credit and several violations of employment conditions; in the other case, leaving the county without the parole officer's consent, obtaining a drivers license by use of an assumed name, unlawful operation of a motor vehicle, and the violation of employment conditions. *Morrissey v. Brewer*, 443 F.2d 942, n. 1, 943, n. 2 (8th Cir. 1971). In both cases, when the petitioners learned of the reasons for the revocations, they disputed some or all of the factual allegations. However, in neither case were they afforded the opportunity to confront the authors of the reports, to question them concerning the source of the information or to present independent evidence of their own. The decision to return the petitioners to prison lacked the most rudimentary requirements of due process.

Extension of the right to a hearing to prisoners facing serious internal disciplinary action by prison officials goes beyond the claim of petitioners in the present case. However, the provision of such is being ordered in a growing number of federal court decisions addressing procedural due process issues in prison disciplinary actions that involve the loss of statutory good-time credits or the meting out of serious deprivations within the prison, such as solitary confinement. *E.g.*, *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *United States ex rel. Campbell v. Pate*, 401 F.2d 55 (7th Cir. 1968); *Landman v. Royster*, 333 F.Supp. 621 (E.D.Va. 1971); *Cluchette v. Procunier*, 328 F.Supp. 767 (N.D.Cal. 1971); *Bundy v. Cannon*, 328 F.Supp. 165 (D.Md. 1971).

Cases involving the transfer of prisoners between institutions provide another analogy to the present case. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), this Court rejected a statutory procedure under which a prisoner was civilly committed upon expiration of his penal sentence. Since all other persons civilly committed were entitled to a jury trial on the question of sanity before being transferred, the commitment of prisoners at the request of the director of a state hospital was held to constitute a denial of equal protection of the laws. Although *Baxstrom* involved a person no longer under criminal sentence, the decision served as precedent for two cases in which no extension of the length of sentence was involved but offenders were transferred from one institution to a more restrictive institution. In *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969), the Court of Appeals for the Second Circuit ruled that a prisoner who had been sentenced to a term of from twenty-five years to life was entitled to a hearing before being transferred to the Dannemora State Hospital for the criminally insane; in *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969), a hearing was required before an "incurable" juvenile delinquent could be transferred from a juvenile institution to a men's prison. In both of these cases a transfer between custodial situations was at issue. If hearings are to be required in such circumstances, they are required *a fortiori* when a parolee who has been at liberty in the community, albeit with certain conditions attached, is returned to prison.

## II. PROVISION OF A HEARING FOR REVOCATION OF PAROLE SERVES THE INTERESTS OF THE CORRECTIONAL PROCESS.

The American Correctional Association, which is the professional organization of prison administrators, has endorsed the principle of providing hearings when parole is

revoked. The A.C.A. deals with the subject of parole revocation in its *Manual of Correctional Standards* (3d edition, 1966), which recognizes that:

To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections, or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary. *Id.* at 279.

Despite the fact that the latest edition of the *Manual* was prepared before most of the court decisions recognizing the right to a hearing upon revocation of probation or parole, it specifically provides for parole revocation hearings:

As soon as practicable after causing an alleged violator taken into custody on the basis of a parole board warrant, the prisoner should be given an opportunity to appear before the board or its representative. The prisoner should be made fully aware of the reasons for the warrant, and given ample opportunity to refute the charges placed against him or to comment as to extenuating circumstances. The hearing should be the basis for consideration of possible reinstatement to parole supervision on the basis of the findings of fact or of reparole where it appears that further incarceration would serve no useful purpose. *Id.* at 130.

In point of fact, the majority of parole systems currently provide for hearings on parole revocation (all but eight states) without apparent disadvantage in relation to the handful of states which, like Iowa in *Morrissey*, still fail to meet this procedural requisite (see Appendix A, Brief of the American Civil Liberties Union, *Amicus Curiae*, in this case).

The American Bar Association is in full agreement with the American Correctional Association in this instance. The position that a hearing is to be afforded on parole revocation is consistent with several sets of criminal justice standards formally approved by the Association through its House of Delegates.

For example, *The Standards for Defender Systems*, promulgated by the National Legal Aid and Defender Association in 1965 and adopted by the A.B.A. House of Delegates in 1966, provide for legal representation in parole and probation violation proceedings, obviously assuming the provision of hearings. See American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services*, Appendix B (Approved Draft, 1968). Further exposition of the provision of counsel on revocation of probation or parole in the *Standards Relating to Providing Defense Services* also presupposes the existence of hearings (§4.2 at 40-43).

As late as 1970, the Project on Minimum Standards for Criminal Justice issued a hearing requirement for revocation of probation. *Standards Relating to Probation*, Section 5.4 (Approved Draft, 1970). The reasons are stated in the Commentary to Section 5.4(a):

The probation revocation proceeding involves exactly the same kind of problem as is involved in the criminal trial itself—the ascertainment of historical events about which there may

be some dispute and the consideration of those events against a standard of conduct to which the probationer is expected to adhere.

Parole revocation also turns on ascertainment of historical events against a standard of conduct expected of the parolee. Coupled with the threat of incarceration present in such situations, it seems indistinguishable from considerations inherent in revoking probation.

Similarly, the President's Commission on Law Enforcement and Administration of Justice, recommended in *The Challenge of Crime in a Free Society* 150 (1967), that legal assistance be provided in parole and probation revocation proceedings, also presuming that such hearings would be held. The Commission's Task Force on Corrections explicitly provided that:

The offender threatened with revocation should... be entitled to a hearing comparable to the nature and importance of the issue being decided. Where there is some dispute as to whether he violated the conditions of his release, the hearing should contain the basic elements of due process—those elements which are designed to ensure accurate factfinding. *Task Force Report: Corrections* 88 (1967).

The *Model Penal Code* of the American Law Institute also contemplates hearings on charges of parole violation:

When a parolee has been returned to the prison, the board of parole shall hold a hearing within sixty days of his return to determine whether his parole should be revoked. The parolee shall have reasonable notice of the charges filed. The institutional parole staff shall render reasonable aid to the parolee in preparation for

the hearings and he shall be permitted to advise with his own legal counsel. At the hearing, the parolee may admit, deny or explain the violation charged, and he may present proof, including affidavits and other evidence, in support of his contention. Section 305.15, Proposed Official Draft (1962).

The National Council on Crime and Delinquency, whose membership includes a large number of probation and parole officers and other professionals, as well as private citizens, promulgated a *Standard Probation and Parole Act* in 1955. Section 25 of the Act specifically provides for hearings whenever parole is alleged to have been violated. Since publication of its 1955 Act, the NCCD has gone further and recommended hearings as part of internal prison disciplinary procedures:

Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall not be imposed without a hearing at which the prisoner shall have a right to be present and a right to be represented by counsel or some other person of his choice. National Council on Crime and Delinquency, *A Model Act for the Protection of Rights of Prisoners*, Section 4 (1972).

It should be noted that all the cited standards and model enactments seek to accord procedural protections beyond the minimal hearings rights at issue in this case.

We are a society dedicated to the rule of law. Yet to this day, but for the recent decisions by this Court and lower federal courts, our correctional systems have operated without the procedural safeguards generally considered essential even for administrative actions concerning interests in property. The present case presents an instance of the

way in which the system can act arbitrarily by relying on the unverified allegations of an individual to, deprive an offender, of his personal liberty. It is just this type of administrative activity, devoid of rudimentary fairness, that constitutes one of the most frequently voiced grievances of offenders and tends to vitiate their respect for the law. As the President's Crime Commission noted:

... a system which recognizes that offenders have certain rights is not inconsistent with the goal of rehabilitation. A person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation. And the "collaborative regime" advocated in this volume is one ... which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights and are subject to the absolute authority of correctional officials. *Task Force Report: Corrections* 83 (1967).

The parolee is in the community and but one step removed from complete release to society. If, as federal programs are now emphasizing, the future of criminal corrections lies in the direction of community programs, there is a vital need to assure the individual offender that the opportunity to participate in such programs, once gained, is not lost to him through the arbitrary actions of a single official operating without responsibility to account for his decisions or to ensure that they are based on verified facts. Implementation of this principle that offenders have the right to expect fair procedures from correctional authorities, rather than impeding the correctional process, is essential if the system is to achieve its goal of rehabilitating offenders. See e.g., F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training*, 105

(1969); R. Goldfarb and L. Singer, *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175 (1970); P. Hirschkop and M. Millemann, *The Unconstitutionality of Prison Life*, 55 Va. L. Rev. 795 (1969); R. Kutak, *From the Outside Looking In: Grim Fairy Tales for Prison Administrators*, Law Enforcement Assistance Administration (Monograph, 1970).

The courts are sensitive, as never before, to the necessity of bringing the rule of law into the correctional system. Confirmation of the applicability of due process hearing rights in parole revocation proceedings will, in the view of the American Bar Association, constitute a sound and timely step toward realization of that objective.

### CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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